In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 154

FIDELITY-BALTIMORE NATIONAL BANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1954, the Fidelity Trust Company, a Maryland corporation, consolidated with the Baltimore National Bank, a national banking association, under the latter's corporate charter pursuant to Section 3 of the National Banking Act, 12 U.S.C. 34a. That section, in relevant part, provides that upon such a consolidation "the corporate existence of each of the constituent banks * * * participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions." Furthermore, the consolidated bank succeeds to all the rights of the constituent banks. The taxpayer (the consolidated bank) claims that Section 3 exempts at

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from the documentary stamp taxes on the issuance of capital stock and the transfer of securities and rights to securities, made in connection with the consolidation, that would concededly otherwise be due under Sections 1802 and 3481 of the Internal Revenue Code of 1939. The district court held for the taxpayer, but the Court of Appeals for the Fourth Circuit reversed.

Petitioner's contention is based on the premise that Section 3 should be interpreted literally. The legislative and judicial history of Section 3, however, make clear that it was intended to do no more than to preserve to the consolidated corporation the previously existing rights of its constituent banks, including those rights they exercised under fiduciary appointments of State courts. See *Seattle-First Nat. Bank* v. *United States*, 44 F. Supp. 603, 609-610 (E.D. Wash.), affirmed, 136 F. 2d 676 (C.A. 9), affirmed, 321 U.S. 583. Compare *Ex parte Worcester Nat. Bank*, 279 U.S. 347, with *New England M. Nat. Bank* v. *Centenary Methodist Ch.*, 342 Mass. 360, 173 N.E. 2d 294. Neither the history of Section 3 nor logic suggests any reason why Congress would grant an exemption from the documentary stamp tax upon the consolidation of banks which did not apply to the merger of other corporations.

The taxpayer concedes (Pet. 5) the absence of a conflict, but nevertheless asserts (Pet. 5–7) that the decision below conflicts in principle with *Old Nat. Bank in Evansville* v. *Commissioner*, 256 F. 2d 639 (C.A. 7), and *United States* v. *Northwestern Nat. Bank & T. Co. of Minneapolis*, 137 F. 2d 761 (C.A. 8). The former case held that the taxpayer, a national bank, had the right to carry over an unused excess

profits tax credit of a state bank after the latter had merged with the national bank. As the Fourth Circuit pointed out, the case was governed by *Libson Shops, Inc. v. Koehler*, 353 U.S. 382, and "has little bearing on the present case" (Pet. App. 26a). Nor, we believe, is the *Northwestern Nat. Bank* case apposite, since it related not to the documentary stamp taxes, but to the wholly unrelated capital stock tax which originated as a temporary measure in Section 215 of the National Industrial Recovery Act (48 Stat. 195, 207), was incorporated in the Internal Revenue system by Section 701 of the Revenue Act of 1934 (48 Stat. 680, 769), and was repealed by Section 201 of the Revenue Act of 1945 (59 Stat. 556, 574).[1]

Finally, the issue involved here is not of substantial importance. The statutory provisions under consideration have existed since 1933 without previously having been the subject of any litigation. Thus, even if the taxpayer could show a conflict, it would plainly not be of the kind requiring resolution by this Court.

For these reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JULY 1964.

[1] In addition, we believe, as the court of appeals suggested (Pet. App. 26a-27a), that the decision in *Northwestern Nat. Bank* was erroneous.